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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON, PETITIONER

V.

WILLIAM O. DYER, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does due process require that a prior felony conviction which arose from a plea of guilty entered prior to the date of decision in Boykin v. Alabama be subject to collateral attack by a criminal defendant in a subsequent proceeding for enhanced punishment under a state habitual criminal statute on the ground that the procedures for acceptance of the prior plea were not in compliance with the requirements announced in that decision?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
Table of Cases.....	iii
Other Authority.....	v
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR ALLOWANCE OF WRIT.	6
I. THE DECISION OF THE COURT BELOW IS AN ERRONEOUS APPLICATION OF FEDERAL CONSTITUTIONAL PRINCIPLES....	6
II. THE DECISION BELOW IS BASED UPON FEDERAL CONSTITUTIONAL PRINCIPLES AND IS NOT SUPPORTED BY AN INDEPENDENT AND ADEQUATE STATE GROUND	19
CONCLUSION.....	24
APPENDIX	

TABLE OF AUTHORITIES

Table of Cases

	Page
Boykin v. Alabama, 345 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).....	5,6,7,12, 13,18,19, 20
Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).....	7,9,11,18, 19
California v. Green, 399 U.S. 149, 90 S.Ct. 1980, 26 L.Ed.2d 849 (1970).....	21
Deleware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, ____ L.Ed.2d ____ (1979).....	21,22,23
Film Fox Corporation v. Muller, 296 U.S. 207, 56 S.Ct. 138, 80 L.Ed. 158 (1935).....	19
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	9,11,14
Halliday v. United States, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969).....	12
Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).....	19
Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1109 (1927).....	20

Kitchens v. Smith, 201 U.S. 847, 91 S.Ct. 1089, 28 L.Ed.2d 519 (1971)..... 11

Lewis v. United States, ____ U.S. ____, 100 S.Ct. 915, ____ L.Ed.2d ____ (1980)..... 13,15,18, 22

McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)..... 12

Miesbauer v. Rhay, 79 Wn.2d 505, 487 P.2d 1046 (1971)..... 21

Moss v. Craven, 427 F.2d 139 (9th Cir. 1970)..... 12

North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, ____ L.Ed.2d ____ (1979)..... 22

Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975)..... 21,22

People v. Gonzales, 38 Co.A. 522, 565 P.2d 945 (1977)..... 16

Southern Railroad Co. v. Mayfield, 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed.2d 3 (1950)..... 23

State v. Cimini, 53 Wash. 268, 101 P. 891 (1909)..... 20

State v. Holsworth, 93 Wn.2d 143, 607 P.2d 845 (1980)..... 6,8,9,10, 11,15,18,19

State v. LeBlanc, 315 So.2d 654 (La. 1975)..... 17

State v. Taft, 49 Wn.2d 98, 297 P.2d 1116 (1956)..... 20

Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976)..... 12

Woods v. Rhay, 68 Wn.2d 601, 414 P.2d 601 (1966)..... 20,21

Young v. Konz, 91 Wn.2d 532, 588 P.2d 1360 (1979)..... 23

Zacchini v. Scripps-Howard Broadcasting Co., 448 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977)..... 22

Other Authority

United States Constitution, Fourteenth Amendment..... 2

Washington State Constitution, Article 1, Section 3..... 2

Revised Code of Washington 9.92.090..... 2,8

18 U.S.C. Section 1202(a)(1).... 14

18 U.S.C. Section 1257(3)..... 2

The Petitioner, the State of Washington, request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Washington, Division II, issued on March 21, 1980.

OPINION BELOW

The opinion of the Court of Appeals of the State of Washington, Division II, is unreported. A copy is appended.

JURISDICTION

The judgment of the Court of Appeals of the State of Washington, Division II, was filed on March 21, 1980. The timely motion for reconsideration was denied on April 18, 1980. A timely petition for review in the Supreme Court of the State of Washington was denied on June 20, 1980, and this petition for certiorari was filed within sixty days of that date. This Court's juris-

diction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . .

Article 1, Section 3, of the Constitution of the State of Washington provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

The Revised Code of Washington, 9.92.090, provides in relevant part:

> Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a

> felony, or who shall previously have been four times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state penitentiary for life.

STATEMENT OF THE CASE

William O. Dyer was charged by Information on March 9, 1978, of the crimes of Possession of Stolen Property in the Second Degree and Conspiracy to Commit Second Degree Theft. The evidence in the case revealed that Dyer, with the assistance of one Terry Lynn Cook and others, used a stolen checkbook and forged checks for the acquisition of a large dollar volume of construction materials. Some of these materials were used in Dyer's "construction business," and some were returned to the "sellers" for refunds. Dyer was convicted by jury trial in Kitsap County, Washington of

both charges on June 16, 1978.

After the jury returned its verdict of guilty on both charges, on July 5, 1978, the State filed a Supplemental Information alleging that Dyer had attained the status of an habitual criminal. The state relied on two portions of Dyer's previous criminal history: (1) a Second Degree Burglary conviction in Superior Court of the State of Washington for Kitsap County resulting from a guilty plea entered in August, 1962, and (2) any one of three (alleged in the alternative) prior felony convictions for Unlawful Possession or Delivery of a Controlled Substance in the 203rd Judicial Court of the State of Texas for Dallas County resulting from guilty pleas in August, 1974.

Prior to trial on the Supplemental Information, counsel for Dyer sought to exclude the use of his 1962

burglary conviction on the ground, inter alia, that the record failed to establish the "voluntariness" of his guilty plea. The trial court rejected this and all other claims as to this conviction, and held it to be admissible.

Dyer was tried on the Supplemental Information on September 5, 1978, before a jury, and was found, by verdict of the jury, on September 6, 1978 to have attained the status of an habitual criminal.

On direct appeal, Dyer contended in part that it was error for the State to be permitted to rely upon the 1962 burglary conviction for habitual criminal purposes since the record failed to show that at the time of plea entry he had been fully informed of the consequences of his plea as required by the subsequent decision of this Court in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). By its decision of March 21, 1980, the Court of Appeals of the

State of Washington accepted such contention, given the recent holding on this issue by the Supreme Court of the State of Washington in State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980), and remanded the case for resentencing. A motion for reconsideration of this decision was denied, as was a petition for review by the Supreme Court of the State of Washington.

REASONS FOR ALLOWANCE OF WRIT

I.

THE DECISION OF THE COURT BELOW IS AN ERRONEOUS APPLICATION OF FEDERAL CONSTITUTIONAL PRINCIPLES.

This case presents the Court with the much needed opportunity to further define the scope of a criminal defendant's right to collaterally attack a prior felony conviction in light of the Court's decision in Boykin v. Alabama, supra, and to further define the rights

of states to rely upon such prior convictions for use in proceedings for enhanced punishment under recidivist and habitual offender statutes. Not since the case of Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), it is believed that the Court has squarely confronted such an issue in this context.

Boykin v. Alabama, supra, held that, as a matter of constitutional due process, for a guilty plea to have been knowningly and voluntarily entered, the record must show that the pleading defendant had been advised of the nature of the offense, the sentencing alternatives possible, and that his plea of guilty necessarily waives his constitutional rights to remain silent, to confront accusers, and to a jury trial. The issue presented by this petition is whether a conviction arising from a pre-Boykin plea, accepted without compli-

ance to such requirements, may be used by the State of Washington in sentence enhancement proceedings in 1978 under the Washington Habitual Criminal Statute, RCW 9.92.090.

In holding that the State was barred from use of such convictions, the court below accepted and felt bound by the reasoning and decision in State v. Holsworth, supra. Thus, it is that decision which must be the focus analysis.

State v. Holsworth, supra, involved seven cases consolidated on appeal, all presenting precisely the issue in this petition. In Holsworth, the court described its holding as being:

> . . . that the defendant in a habitual criminal proceeding can attack the use of convictions based upon pre-Boykin guilty pleas and that the state has the burden of proving beyond a reasonable doubt that the prior conviction was based on a valid guilty plea.
>
> 607 P.2d at 847.

The reasoning of that decision is based primarily upon an analogy to the decision of this Court in Burgett v. Texas, supra, holding that a conviction invalid under Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), could not be used for enhancement of punishment under a state's recidivist statute. Specifically, the Holsworth court wrote:

> An analogy must be drawn to Burgett v. Texas, 389 U.S. 109, 19 L.Ed.2d 319, 88 S.Ct. 258 (1967), the in which United States Supreme Court ruled that it was reversible error to admit, for purposes of enhanced sentencing under a habitual criminal statute, evidence of a prior conviction by guilty plea entered by a defendant unrepresented by counsel at the time of the plea. The conviction whose use was successfully challenged in Burgett had occurred before Gideon v. Wainright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963), established the right to counsel. But the Supreme Court refused to allow use of the prior conviction because admission of the

> evidence would have in effect "renewed" the deprivation of the defendant's constitutional rights.
>
> 607 P.2d at 848.

In response to the State's petition that the analogy was inappropriate given the differing levels of constitutional stature, the Holsworth court wrote:

> Both Gideon and Boykin, then, are "merely prophylactic" to the extent they insure the existence of procedures which protect the defendant's constitutional rights to remain silent, to confront his accusers, and to trial before a jury. Extension of the Burgett analysis to the use of pre-Boykin pleas which were not adequately informed is justified by the importance of full disclosure to valid waiver of these constitutional rights through the plea of guilty.
>
> 607 P.2d at 848-49.

Finally, the court in Holsworth stated:

> Thus, it can be seen that failure to disclose the nature of the offense or consequences of a plea may result in a procedural defect of constitutional magnitude if the defendant's plea as a consequence of that failure is involuntary. As in Burgett,

> violation of the defendant's constitutional right is "renewed" through use in a habitual criminal proceeding of an uninformed guilty plea which thus violates due process.
>
> 607 P.2d at 849.

The error in the Holsworth reasoning is in its inappropriate extension of Burgett v. Texas to pre-Boykin plea requirements. Gideon v. Wainwright, supra, involved the right to counsel, a Sixth Amendment right of fundamental constitutional stature. For that reason, the holding of Gideon v. Wainwright is fully retroactive. Kitchens v. Smith, 401 U.S. 847, 91 S.Ct. 1089, 28 L.Ed.2d 519 (1971). Thus, pre-Gideon convictions are themselves constitutionally infirm and subject to collateral attack. As stated in Burgett, to allow the State to rely on such constitutionally invalid convictions would cause the prior constitutional violation to be "renewed."

By contrast, Boykin v. Alabama, supra, established constitutionally prescribed procedural rules which seek to insure and protect the underlying fundamental right involved: a knowing, intelligent, and voluntary plea of guilty. In that sense, the rule announced in Boykin is prophylactic in nature rather than itself being of fundamental constitutional stature. For this reason, the prevailing view, in the absense of any specific holding by this court, is that the rule announced in Boykin v. Alabama is not applied retroactively. See, e.g., Moss v. Craven, 427 F.2d 139 (9th Cir. 1970); Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976).[1]

[1] The same result was reached with respect to Rule 11, Federal Rules of Criminal Procedure, when the Court held that the plea entry procedures of Rule 11 as described in McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), should not be applied retroactively. Halliday v. United States, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969).

The impropriety of the Burgett/ Boykin analogy is clear. No constitutional violation for reason of non-compliance with Boykin v. Alabama, supra, can exist as to any pre-Boykin plea. Rather obviously, subsequent habitual criminal proceedings cannot result in "renewed" constitutional violations as to such pleas because that which never existed cannot be "renewed." To say that the same plea would be entered differently under presently applicable constitutional standards does not imply that there exist any constitutional infirmaties in the conviction as it presently stands.

The reasoning of the Washington Court is inconsistent with the recent decision of this Court in Lewis v. United States, ____ U.S. ____, 100 S.Ct. 915, _____ L.Ed.2d ____ (1980), decided thirteen days after Holsworth. In Lewis, the defendant had been convicted

under 18 U.S.C. Section 1202(a)(1) which prohibits possession of a firearm by a person who "has been convicted by a court of the United States or of a State . . . of a felony." On appeal, it was argued that the reliance upon the prior state court felony conviction as an essential element of the subsequent criminal offense was improper since that conviction was obtained in violation of Gideon v. Wainwright, supra. In rejecting such claims, this Court held that Section 1202(a)(1) prohibits a convicted felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack, and that no constitutional violation arises as a result of the prohibit because Congress could rationally conclude that any existing felony conviction, including an allegedly invalid one, is a sufficient basis upon which to prohibit possession

of a firearm.

The reasoning and holding in Lewis v. United States, supra, very clearly shows the error in Holsworth, and the instant case as well. Lewis involved a constitutional right of much greater stature than the mere prophylactic rule of Boykin and involved the allegedly improper conviction as being an element of a separate criminal offense rather than support for an enhanced punishment status. Finally, while Holsworth, involves an extension of Burgett into areas involving substantially different constitutional issues, Lewis marks the limitation on the Burgett "renewal" analysis even within the area of uncounseled convictions. The error of State v. Holsworth, supra, and the instant case by application, could not be more clear.

The holding of State v. Holsworth, supra, is also directly inconsistent

with the decision of at least two other states. In People v. Gonzales, 38 Co.A. 522, 565 P.2d 945 (1977), the Colorado Court of Appeals rejected the efforts of a defendant to suppress two prior convictions in subsequent habitual criminal proceedings. One such conviction was based upon a pre-Boykin to First Degree Burglary. In describing the framework for its decision, the court stated:

> Whether the previous convictions were constitutionally procured is an issue which may properly be raised in an habitual offender proceeding. See Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319; Swift v. People, 174 Colo. 259, 488 P.2d 80. If a defendant's guilty plea was not voluntary and knowing, it was obtained in violation of due process, and a conviction based thereon cannot be used for the purpose of enhancing the punishment for another offense. See Swift v. People, supra. The test in this state for voluntariness of a guilt plea is whether there was compliance by the sentencing court with the requirements of Crim.P. 11 in effect at the

> time of the plea and of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, as to a plea received after its announcement date, June 2, 1969. People v. Hubbard, 184 Colo. 243, 519 P.2d 945. Boykin is not applied retroactively. People v. Alvarez, 181 Colo. 213, 508 P.2d 1267.
>
> 565 P.2d at 948.

Further, in State v. LeBlanc, 315 S.2d 654 (La. 1975), the Louisiana Supreme Court considered a defendant's challenge in a prosecution under the Louisiana Habitual Offender Law to a prior forgery conviction resulting from a 1968 plea of guilty. In rejecting this challenge, the court wrote:

> In order for a prior felony conviction to form the basis for a multiple offender charge, it must, inter alia, have been obtained without the violation of a specific federal constitutional right of the accused. Defendant argues here that the prior conviction, which resulted from a plea of guilty to the charge of forgery, was obtained in violation of his federal constitutional rights, specifically, his privilege

> against self-incrimination under the fifth amendment to the United States Constitution and his sixth amendment rights to trial by jury and the confrontation of his accusers, as articulated in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969. It is well-settled that the rule of law announced in Boykin decision is prospective in operation only from the date of the decision, June 2, 1969. As the defendant's guilty plea to the forgery charge was entered on March 15, 1968, prior to the rendition of the Boykin decision, the rule has no application here. Accordingly, defendant's assignment of error is without merit.
>
> 315 So.2d at 655-56.

In summary, the court below, bound by the precedent of State v. Holsworth, has erroneously applied the decisions of this Court in Boykin v. Alabama and Burgett v. Texas, and has made such a decision in conflict with Lewis v. United States and the decisions of last resort of at least two other states. This Court should grant the writ of certiorari

to review these proceedings and resolve such conflicts.

II.

THE DECISION BELOW IS BASED UPON FEDERAL CONSTITUTIONAL PRINCIPLES AND IS NOT SUPPORTED BY AN INDEPENDENT AND ADEQUATE STATE GROUND.

Were the Judgment below to be based on an independent and adequate state ground, this Court would lack jurisdiction. Film Fox Corporation v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). However, the decision below is a direct result of the decision in State v. Holsworth, supra, and that decision is based upon that court's view of federal constitutional mandates.

As is clear from the Court's analysis of Boykin v. Alabama and Burgett v. Texas, and its references to Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976), the issue is primarily

analyzed as one of federal constitutional requirements. Some reference is made to prior Washington cases regarding the requirements for a knowing and voluntary guilty plea. State v. Cimini, 53 Wash. 268, 101 P. 891 (1909); State v. Taft, 49 Wn.2d 98, 297 P.2d 1116 (1956); Woods v. Rhay, 68 Wn.2d 601, 414 P.2d 601 (1966). However, these cases essentially establish nothing more than the underlying constitutional requirement that: "A plea of guilty shall not be accepted ...a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1109 (1927). None of the cited Washington cases established requirements similar to those imposed by Boykin v. Alabama, and, in fact, the Washington courts have in the past attempted to distinguish and

limit the effect of Boykin. Miesbaur v. Rhay, 79 Wn.2d 505, 487 P.2d 1046 (1971); Wood v. Morris 87 Wn.2d 501, 554 P.2d 1032 (1976).[2]

In short, the Supreme Court of the State of Washington has expressed its view of Federal Constitutional principles, and the Court below has accepted that view as mandatory president. As such, the issues presented here are within the jurisdiction of this Court. Deleware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, ____ L.Ed.2d ____ (1979); Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26

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[2] That portion of Woods v. Rhay, supra, set out in Holsworth at 93 Wn.2d 157, 607 P.2d 849-50, had previously been construed by the Washington Supreme Court not to impose constitutional required plea entry procedures, but merely establish a "recommended approach" as to better "forestall later attacks" on such pleas. Miesbauer v. Rhay, supra, 79 Wn.2d at 507, 487 P.2d at 1047.

L.Ed.2d 489 (1970).

While having made some mention of State law, the Holsworth opinion and holding clearly amount to a more restrictive interpretation of federal constitutional principles than has been imposed by this Court. Lewis v. United States, supra. This is not permissible, and it is within the jurisdictional authority of this Court to correct. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, ____ L.Ed.2d ____(1979); Oregon v. Haas, supra.

At very least, this case presents a situation where the state court "felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner it did..." Zacchini v. Scripps-Howard Broadcasting Co., 448 U.S. 562, 568, 97 S.Ct 2849, 53 L.Ed.2d 965 (1977); Delaware v. Prouse, supra.

In the instant case, the State Constitutional provisions are afforded similar scope as their federal counterparts[3] and any constitutional holding on state grounds depended upon the state court's view of the reach of the Fourteenth Amendment. Thus, if the state court misapprehended federal law, "it should be freed to decide... these suits according to its own local law." Southern Railroad Co. v. Mayfield, 340 U.S. 1, 5, 71 S.Ct. 1, 95 L.Ed.2d 3 (1950); Delaware v. Prouse, supra.

Thus, the instant case is properly within the jurisdication of this Court.

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[3] With respect to similar provision of state and federal constitution for due process in areas of criminal procedures, the Washington Supreme Court has considered federal decisions "not necessarily controlling, but entitled to great weight." Young v. Konz, 91 Wn.2d 532, 588 P.2d 1360 (1979), and cases cited therein.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

THE STATE OF WASHINGTON	)	
Respondent,	)	NO. 3732-II
v.	)	Division Two UNPUBLISHED
WILLIAM O. DYER,	)	OPINION
Appellant.	)	Filed March 21, 1980

PETRIE, J. - - William O. Dyer was sentenced to life imprisonment in 1978 following a jury determination of his status as a habitual criminal. He contends in part on appeal that one of his prior felony convictions, upon which the State relies to establish his status, resulted from his entry of a plea of guilty to a charge of burglary in 1962 and that he was not then fully informed of the consequences of his plea as now required by Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). Pursuant to the recent mandate of the Supreme Court, we remand for

APPENDIX

resentencing proceedings in which the State shall be given the opportunity to prove beyond a reasonable doubt that the prior burglary conviction was validly obtained under the Boykin standards. State v. Holsworth, 93 Wn.2d 148, _____ P.2d _____ (1980).

Because of our resolution of this issue, we find it unnecessary to discuss Mr. Dyer's other assignments of error which pertain solely to the habitual criminal portions of his 1978 trial. In the event that the State should sustain its burden of proof as to the validity of the prior burglary conviction and Mr. Dyer is once again sentenced to a life term of confinement, he may renew those assignments of error on a subsequent appeal. Obviously, they will not be moot if Mr. Dyer is sentenced merely to the statutory maximum provided for the class C felony, i.e. possession of stolen goods

in the second degree, of which he was convicted in 1978 by verdict of the jury. Accordingly, we address only those assignments of error which pertain to the underlying trial in 1978.

Mr. Dyer contends he was denied a fair trial on the possession charge (and a gross misdemeanor charge of conspiracy) because of prosecutorial misconduct committed when the deputy who tried the case announced in the presence of the jury that he would call as his next witness the defendant's trial counsel. This is a frivolous assertion. The court immediately declared that counsel would not be called as a witness, and defendant sought no further remedial action. A defendant must avail himself of trial motions in order to correct trial actions which he deems prejudicial. State v. Beard, 74 Wn.2d 335, 444 P.2d 651 (1968). The trial court committed no error.

Next, defendant contends the trial court erred by permitting the prosecution, over defense objections, to introduce into evidence as an exhibit a written statement of a witness which had been given to the police and which implicated Mr. Dyer in the crimes charged. The exhibit was introduced on a re-direct examination of the witness as a prior statement consistent with the witness's testimony on direct examination after that testimony had been impeached by cross-examination, leaving the impression that the witness's direct testimony was a recent fabrication. Under those circumstances, rehabilitation of the witness is permissible through use of a prior consistent statement. State v. Bradley, 17 Wn. App. 916, 567 P.2d 650 (1977) . The trial court committed no error.

This cause is remanded with

direction for re-sentencing proceedings consistent herewith.

A majority of the panel having determined that this opinion not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ Petrie, J.

WE CONCUR:

/s/ Reed, C. J.

/s/ Pearson, J.